FILE COPY

Office-Supreme Court, U.S.
FILED
APR 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 848

SIDNEY M. KELLER and WILLIAM S. KELLER,
Petitioners,

vs.

EDWIN L. SANGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SOL A. HOFFMAN,
MAURICE L. DAVIS,
33 South Clark Street,
Chicago, Illinois,
Counsel for Petitioners.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	11
Appendix:	
1. Statutory Provision Cited and Quoted	1a
2. Judgment of Court of Appeals	2a

CITATIONS

CASES

Allen v. Macpherson, 1 Phillips 133, 1 N. L. Cas. 191	6
American Fire & Casualty Co. v. Finn, 341 U. S. 6 at 8, 17	6, 9
Barnesley v. Powel, 1 Ves. Sen 284	6
Bruner v. United States, 343 U. S. 112	6
Cold Metal Process Co. v. United Co., 351 U. S. 445, 452 (1956)	10
Colorado v. Symes, 286 U. S. 510	10
Deepwater Exploration Co. v. Andrew Weir Ins. Co., U. S. D. C., E. D. La., October 3, 1958, 27 Law Week 2195	10
District 65, Etc. v. McKague, 216 F. 2d 153 (1954)	11

PAGE

Dunaway v. Easter, 129 S. W. 2d 286, 288 6

Ex parte Metropolitan Water Co., 220 U. S. 539 10

Ex parte Northern Pacific Ry. Co., 280 U. S. 142 10

Ex parte Skinner & Eddy Corporation, 265 U. S. 86 10

Farrell v. O'Brien, 199 U. S. 89 ..... 6, 8

Gainesville v. Brown-Crummer Co., 277 U. S. 54 at 59. 9

Harris v. Zion Savings Bank & Trust Co., 317 U. S. 447 ..... 8, 9

In re Broderick's Will, 21 Wall. 503 6

In re Chitwood, 165 U. S. 443 10

Kelleam v. Maryland Casualty Co., 312 U. S. 377 9

Kerrich v. Bransby, 7 Brown P. C. 437 6

Land v. Dollar, 330 U. S. 731 9

Locust v. Randle, 102 S. W. 946 at 947 6

Markham v. Allen, 326 U. S. 490 9

Maryland v. Soper, 270 U. S. 9 10

McClellan v. Carland, 217 U. S. 268 10

Price v. Block, 124 F. 2d 738 (7th Circ.), at 743 8

Quiroz v. Contre, 119 S. W. 2d 568 7

Sears, Roebuck & Co. v. Mackey, 351 U. S. 427, 437 (1956) 11

Stewart v. United States, 199 F. 2d 517 9

Strickland v. Peters, 120 F. 2d 53 at 55 7

Sutton v. English, 246 U. S. 199 ..... 6, 7

United States v. General Motors Corp., 323 U. S. 373 10

Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 8

PAGE

STATUTES

28 U. S. C. §1292(b) 9, 11

28 U.S.C. §1651(a) 10

Vernon's Ann. Texas Stats., Probate Code, §5 7

MISCELLANEOUS

1 Barron and Holtzoff, Federal Practice and Procedure, §352, page 629 9

Hearings before Subcommittee No. 3, House Judiciary Committee, on H. R. 6238 10

House Report 1667, 85th Cong., 2d Sess. 10

Senate Report 2434, 85th Cong., 2d Sess. 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

SIDNEY M. KELLER and WILLIAM S. KELLER,

Petitioners,

vs.

EDWIN L. SANGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Sidney M. Keller and William S. Keller pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on January 27, 1959.

OPINIONS BELOW.

No opinions were rendered by either the District Court or the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 27, 1959 (Appendix, *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether, in a diversity action, the federal District Court possesses jurisdiction to determine issues inextricably intermingled with the probate of a will and the administration of an estate pending in a state probate court?

2. Whether the Court of Appeals may refuse to review a case under section 1292(b) of title 28 of the United States Code, where the district court lacks jurisdiction?

STATUTE INVOLVED.

The statutory provision involved is section 1292(b) of title 28 of the United States Code, 28 U.S.C. §1292(b), added by Public Law 85-919 85th Congress, 1st Session, approved September 2, 1958, which is printed in the Appendix herein, *infra*, p. 1a.

STATEMENT.

On May 2, 1956, Edwin L. Sanger (the respondent herein) filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against Sidney M. Keller, William S. Keller (the petitioners herein), Whitehall Town Homes, Inc., an Illinois corporation, and LaSalle National Bank, as Trustee, a national banking institution in Illinois. The complaint alleged diversity of citizenship between the respondent and the petitioners, and an amount in controversy in excess of $3,000, exclusive of interest and costs. The complaint further alleged that the respondent married Beatrice Keller Sanger; that Beatrice Keller Sanger died intestate at Chicago, Illinois, on July 30, 1954, leaving the respondent and the petitioners, Sidney M. Keller and William S. Keller, her brothers, as her only heirs at law

and next of kin; that at the time of her death she was domiciled in Dallas, Texas; that the petitioners, Sidney M. and William S. Keller "did immediately upon her death assume absolute control of her estate, and thereafter of their own wrong administered said estate to their use and benefit with the intent and effect of defrauding the respondent and depriving him of all that under the law should have come to him"; that the estate of Beatrice Keller Sanger has a value which respondent believed to be in excess of $250,000; and that Beatrice Keller Sanger's estate consisted, in addition to other assets, of stock in the defendant, Whitehall Town Homes, Inc., and of beneficial interest in a trust of which the defendant, LaSalle National Bank, is trustee. The complaint prayed for discovery, disclosure and accounting of the assets of the estate of Beatrice Keller Sanger and the transfer, assignment and delivery to the respondent of "all of the same to which he shall be found to be entitled."

On May 24, 1956, the petitioners filed their answer, stating among other allegations and defenses, that the complaint contained no facts or averments setting forth a cause of action entitling the respondent to any relief against the petitioners; that Beatrice Keller Sanger died leaving a Last Will and Testament executed by her and dated September 2, 1953; that under the will Sidney M. Keller was named executor for assets in Illinois and Sidney M. Keller and the respondent were named co-executors for assets in Texas; that Sidney M. Keller "stands ready to qualify as such Executor of the Estate of said Beatrice Keller Sanger subject to the jurisdiction of the proper court having jurisdiction of the administration of said Estate in accordance with the terms of said Will"; and denying that the petitioners controlled or

converted any assets belonging to the estate of Beatrice Keller Sanger. On June 8, 1956, Sanger replied and denied that Beatrice Keller Sanger left a Last Will and Testament.

Subsequently the petitioners presented a motion for summary judgment. In support of the motion, the petitioners submitted the affidavit of William S. Keller, which affidavit had attached thereto a true copy of the Last Will and Testament of Beatrice Keller Sanger dated September 2, 1953. The affidavit also stated that the original will had been filed in the office of the clerk of the Probate Court of Cook County, Illinois, on March 25, 1957; that the will named the respondent and Sidney M. Keller as co-executors with respect to property in Texas and named Sidney M. Keller executor with respect to property in Illinois; that the complaint alleged that the estate of Beatrice Keller Sanger consisted only of personal property; that under Texas law, the existence of a will renders the administration of an estate necessary and if administration is necessary, an heir at law may not maintain suit to recover property of a decedent; and that under Illinois law, the existence of a will renders the administration of an estate necessary and the ownership of all personal property of a decedent passes to the personal representatives of the estate and not to the heirs at law. On July 16, 1957, the District Judge denied the motion of the petitioners for summary judgment without expressing his reasons for such denial.

On February 25, 1958, the petitioners, upon leave granted, filed a supplement to their answer in which they alleged that on January 20, 1958, the Probate Court of Dallas County, Texas, duly admitted to probate the Last Will and Testament of Beatrice Keller Sanger under

general number 43737, a true copy of the order probating the will being attached to the supplement to the answer. On March 27, 1958, the respondent filed a reply to the supplement to the answer, in which reply he denied that either the will or the order of probate entered in the Probate Court of Dallas County, Texas, was valid and he alleged that on March 27, 1958, he was instituting appropriate proceedings to vacate the order.

On September 8, 1958, the petitioners presented to the District Court for ruling the question as to whether, since the complaint seeks the administration of the estate of Beatrice Keller Sanger and the discovery, recovery and distribution of the assets of the estate, the action is beyond the jurisdiction of the courts of the United States. On January 8, 1959, the District Court entered the order sought to be reviewed in the Court of Appeals. The District Court expressly stated that "the court is of the opinion that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation."

On January 16, 1959, the petitioners filed their petition in the Court of Appeals for leave to appeal under section 1292(b) of title 28 of the United States Code, alleging that the continued and further exercise of jurisdiction by the District Court will irreparably injure and damage the petitioners by requiring them to litigate at substantial cost and expense issues over which the District Court of the United States has no jurisdiction and that the assumption of jurisdiction by the District Court is contrary to and in violation of the public policy and the constitutional and statutory rights of the petitioners, and is a matter of great public concern and interest in

preventing an inferior federal court from acting without jurisdiction or authority.

On January 27, 1959, the Court of Appeals denied the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT.

1. This case raises an important, novel and difficult issue involving the jurisdiction of the federal district courts. *Bruner* v. *United States*, 343 U.S. 112. Prompt, economical and sound administration of justice depends upon definite and finally accepted principles governing the respective jurisdictions of federal and state courts. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 at 8.

A federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789, 1 Stat. 73, which is that of the English Court of Chancery in 1789, did not extend to probate matters. *Kerrich* v. *Bransby*, 7 Brown P.C. 437; *Barnesley* v. *Powel*, 1 Ves. Sen. 284; *Allen* v. *Macpherson*, 1 Phillips 133, 1 H.L. Cas. 191; *In re Broderick's Will*, 21 Wall. 503; *Farrell* v. *O'Brien*, 199 U.S. 89; *Sutton* v. *English*, 246 U.S. 199.

In Texas, the domicile of the decedent, original probate jurisdiction is vested only in the county or probate courts. The state district courts do not have original jurisdiction in probate matters. *Dunaway* v. *Easter*, 129 S.W. 2d 286, 288. The order of a probate court admitting a will to probate is immune from collateral attack, as any other judgment, and it determines that the will offered for probate is in fact the last will and testament of the decedent, that it was unrevoked, and that the testator at the time of its execution had the mental capacity to dispose of his property. *Locust* v. *Randle*, 102 S.W. 946, at 947. See

also, *Quiroz* v. *Contre*, 119 S.W. 2d 568; Vernon's Ann. Texas Stats., Probate Code, § 5. Where under the laws of a particular state, original probate jurisdiction is vested only in a probate court, whose order admitting a will to probate (unless revoked, or reversed on appeal) is conclusive in any collateral suit or controversy relating to any of the property devised or bequeathed under such will, a federal court "has no jurisdiction to adjudge the validity of a will". *Strickland* v. *Peters*, 120 F. 2d 53, at 55. To the same effect, specifically concerning wills subject to probate in the State of Texas, is *Sutton* v. *English*, 246 U.S. 199, at 207-208, in which the Court said at page 208:

> "The present suit being, in an essential feature, a suit to annul the will of Mary Jane Hubbard, and a proceeding of this character being by the laws of Texas merely supplemental to the proceedings for probate of the will and cognizable only by the probate court, it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States."

The will of the decedent has already been admitted to probate in Dallas County, Texas. This is an adjudication of due execution of the will. No federal court may review such adjudication collaterally. It is true that the respondent in the present action has applied to the Dallas County Probate Court to vacate the order of admission of the will to probate; but whether the respondent's application to vacate is successful or unsuccessful, the Texas court of probate remains the only tribunal which may adjudge the validity of the will.

To allow the relief sought by the respondent, and make due distribution of the estate of the deceased wife of the respondent, the federal district court would be required among other matters to do the following:

(a) Adjudge the testacy or intestacy of the decedent and determine the validity or invalidity of the will;

(b) Determine the extent of the estate of the decedent, and the allowable claims against such estate;

(c) Make due provision for payment of the federal estate tax and other proper charges against the estate (if the allegations of the complaint are true, a substantial federal estate tax would be assessable against the estate of the decedent; and no determination of the net estate could be made until such tax was duly determined);

(d) Order distribution of the net estate in accordance with the laws of Texas, applicable to intestate estates, or in accordance with the provisions of any valid will, after adjudging the validity of the will.

These are clearly matters of probate administration, and beyond the jurisdiction of a federal court.

The United States district court, in respect to the administration of the estate of the decedent, is bound by the laws of Texas, the admitted state of domicile of the decedent. The district court possesses no greater chancery powers to supersede the jurisdiction of a Texas probate court, than the chancery courts of Texas. *Price* v. *Block*, 124 F. 2d 738 (7th Circ.), at 743. The matter of the administration of the estate and the collection, apportionment and due distribution of the assets of the decedent, are beyond the jurisdiction of the courts of the United States, and are not matters in regard to which the federal courts may exercise jurisdiction. *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U.S. 33; *Harris* v. *Zion Savings Bank & Trust Co.*, 317 U.S. 447; *Farrell* v.

O'Brien, 199 U.S. 89. The application by the respondent to the Probate Court of Dallas County for relief in the probate proceedings is pending and undetermined. The pendency of his application and the maintenance of the probate proceedings in any event precludes the district court from interfering with the orderly administration in probate of the estate of the decedent. *Kelleam* v. *Maryland Casualty Co.*, 312 U.S. 377.

Despite the above principles, which should be well established, there is much confusion and uncertainty surrounding federal jurisdiction in probate matters. *Markham* v. *Allen*, 326 U. S. 490; *Harris* v. *Zion Savings Bank & Trust Co.*, 317 U. S. 447. This is an important area of state-federal relationship which should be clarified.

The jurisdiction of the federal courts is carefully guarded against improper expansion. *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6 at 17. Lack of jurisdiction of the subject matter cannot be waived. Jurisdiction must affirmatively appear and the question of its absence may be raised at any time. *Gainesville* v. *Brown-Crummer Co.*, 277 U. S. 54, at 59; *Stewart* v. *United States*, 199 F. 2d 517; 1 Barron and Holtzoff, *Federal Practice and Procedure*, §352, page 629. When the question of a federal district's court jurisdiction is raised, the facts in regard thereto may be established by affidavits, as in the present case, or in any other manner. *Land* v. *Dollar*, 330 U. S. 731.

2. This case also raises an important and novel issue involving the construction and application of the act of Congress approved on September 2, 1958 (Public Law 85-919, 85th Congress, 1st Session) adding section 1292(b) to title 28 of the United States Code (28 U.S.C. §1292(b)), known as the "Interlocutory Appeals Act."

The Interlocutory Appeals Act was enacted to enable review of orders not considered final, where 28 U. S. C. §1651(a) would apply and where the District Court lacks jurisdiction. Hearings before Subcommittee No. 3, House Judiciary Committee, on H. R. 6238; House Report 1667, 85th Cong., 2d Sess.; Senate Report 2434, 85th Cong., 2d Sess.; *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, U. S. D. C., E. D. La., October 3, 1958, 27 Law Week 2395.

28 U. S. C. §1651(a) provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis supplied).

The Supreme Court has many times upheld its own right and duty and the right and duty of Courts of Appeal to issue writs of prohibition or mandamus to restrain the exercise of jurisdiction by district courts in cases where exclusive jurisdiction is vested in a state court. *In re Chitwood*, 165 U. S. 443; *McClellan* v. *Carland*, 217 U. S. 268; *Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Skinner & Eddy Corporation*, 265 U. S. 86; *Maryland* v. *Soper*, 270 U. S. 9; *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142; *Colorado* v. *Symes*, 286 U. S. 510.

This Court consents to review cases, despite their interlocutory status, when important jurisdictional questions are raised. *United States* v. *General Motors Corp.*, 323 U. S. 373; *Land* v. *Dollar*, 330 U. S. 731.

Although the statute here vests the Courts of Appeals with discretion, it is fundamental that a court may not abuse its discretionary powers. *Cold Metals Process Co.*

v. *United Co.*, 351 U. S. 445, 452 (1956); *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 437 (1956); *District 65, Etc.* v. *McKague*, 216 F. 2d 153 (1954). The basic problem to be solved here is whether the Court of Appeals may refuse to review a case under section 1292(b) of title 28 of the United States Code, where the district court lacks jurisdiction.

CONCLUSION.

This case presents for initial consideration by this Court the construction of the Interlocutory Appeals Act and the problem of the dichotomy between federal and state jurisdiction in probate matters.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Sol A. Hoffman,
Maurice L. Davis,
Counsel for Petitioners.

April 16, 1959.

2. Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, January 27, 1959

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. John S. Hastings, Circuit Judge

Hon. W. Lynn Parkinson, Circuit Judge

Sidney M. Keller and William S. Keller, Petitioners, vs. Edwin L. Sanger, Respondent.	Petition for Leave to Appeal from an Order of the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12546

It is Ordered By The Court that the petition of Sidney M. Keller and William S. Keller for leave to appeal from the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on January 8, 1959, in Cause No. 56 C 817, wherein Edwin L. Sanger is plaintiff and Sidney M. Keller, et al are defendants be, and it is hereby, denied.